FILE COPY

No. 73-41

Supreme Court, U.S.
FILED
JUL 2
MICHAEL RODAK

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM FABRYCKI,
MATTHEW ZIVICH,

Petitioners,

vs.

THE TRUSTEES OF INDIANA UNIVERSITY in their official capacity as body politic of Indiana University; JOHN W. RYAN, individually and in his capacity as President of Indiana University and former Vice President of Regional Campuses; JOSEPH LEE SUTTON, individually and in his capacity as former President of Indiana University; DEAN RUFUS REIBERG, individually and in his capacity as Acting Vice President of Regional Campus; DR. LESTER WOLFSON, individually and in his capacity as Chancellor, Indiana University at South Bend; DR. WALT RISLER, individually and in his capacity as Academic Dean, Indiana University at South Bend; PROF. DONALD SNYDER, individually and in his capacity as Director, Division of Arts and Sciences, Indiana University at South Bend; PROF. HAROLD ZISLA, individually and in his capacity as Chairman of the Art Department, Indiana University at South Bend; PROF. LARRY CLIPPER, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. CHARLES TULL, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. GLORIA SHAPIRO, individually and in her capacity as a member of the Faculty and Promotion and Tenure Committee; PROF. WAYNE KREPLE, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. GEORGE WING, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; and THE REGIONAL CAMPUSES FACULTY PROMOTION AND TENURE BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN J. ROPER
CHAPLEAU, ROPER, McINERNY & FARABAUGH
316 First Bank Building
South Bend, Indiana 46601
Telephone: 233-5173

JOSEPH A. ROPER
Attorneys for Petitioners

© The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. The Seventh Circuit has Decided an Important Question of Federal Law Which has not been but Should be Settled by this Court	6
II. The Seventh Circuit has Decided a Federal Question in a Way in Conflict with the Applicable Decisions of this Court	8
CONCLUSION	9
APPENDIX A: Opinion of the Court of Appeals	1a
APPENDIX B: Opinion of the District Court	5a
APPENDIX C: Rule for Tenure	11a

Table Of Citations

Cases

Connell v. Higginbotham, 403 U.S. 207, 91 S. Ct. 1772, 29 L. Ed. 2d 418	6
Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, ... L. Ed. 2d	6, 8
Roth v. Board of Regents of State Colleges, 408 U.S. 564, 92 S. Ct. 2701, ... L. Ed. 2d	6, 8

PAGE

Slochower v. Board of Education, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 6

Weiman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 6

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States of America Fourteenth Amendment 5, 6

28 U.S.C., Section 1254(1) 2

42 U.S.C., Section 1983 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

WILLIAM FABRYCKI,
MATTHEW ZIVICH,

Petitioners,

vs.

THE TRUSTEES OF INDIANA UNIVERSITY in their official capacity as body politic of Indiana University; JOHN W. RYAN, individually and in his capacity as President of Indiana University and former Vice President of Regional Campuses; JOSEPH LEE SUTTON, individually and in his capacity as former President of Indiana University; DEAN RUFUS REIBERG, individually and in his capacity as Acting Vice President of Regional Campus; DR. LESTER WOLFSON, individually and in his capacity as Chancellor, Indiana University at South Bend; DR. WALT RISLER, individually and in his capacity as Academic Dean, Indiana University at South Bend; PROF. DONALD SNYDER, individually and in his capacity as Director, Division of Arts and Sciences, Indiana University at South Bend; PROF. HAROLD ZISLA, individually and in his capacity as Chairman of the Art Department, Indiana University at South Bend; PROF. LARRY CLIPPER, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. CHARLES TULL, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. GLORIA SHAPIRO, individually and in her capacity as a member of the Faculty and Promotion and Tenure Committee; PROF. WAYNE KREPLE, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. GEORGE WING, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; and THE REGIONAL CAMPUSES FACULTY PROMOTION AND TENURE BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in these causes on the 6th day of April, 1973.

OPINIONS BELOW

The opinion of the District Court appears at ....., F. Supp. and is reproduced, in the Appendix to this petition at App. 5a. The opinion of the Court of Appeals is reported at ....., F. 2d, ... and is reproduced in the Appendix to this petition at App. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on the 6th day of April, 1973. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Where there were state rules for eligibility for tenure, does a college professor have a procedural due process right to at least a statement of reasons as to why he was denied tenure, and/or a right to a hearing to attempt to prove that he was eligible for the same.

STATEMENT OF THE CASE

Petitioners William Fabrycki and Matthew Zivich are college teachers by profession. Both were artists who lived, worked, and exhibited in the South Bend St. Mary's community for at least seven (7) years. Zivich taught oil painting, freehand drawing, crafts and design, sculpture, and art appreciation during this period; while Fabrycki taught painting, art history, and print-making at St. Mary's College for three (3) years and at Indiana University at South Bend for four (4) years.

In their sixth year of teaching, the petitioners were notified by the administration that a tenure decision would be made within that year. They used the following

procedures: The Chairman of the Art Department submitted his recommendations for or against tenure to the Chairman of the Division of Arts and Sciences; this chairman submitted his recommendations to the Dean of Faculties, who in turn submitted his recommendations to the Chancellor of Indiana University at South Bend, a regional campus of Indiana University at Bloomington; who in turn submitted his recommendations to five (5) secret members of the Faculty Promotions and Tenure Committee, who in turn submitted their recommendations to the secret members of the All Regional Campus Faculty and Tenure Committee located at Bloomington, Indiana; who in turn submitted their recommendations to the Vice-President of Indiana University, who in turn submitted his recommendations to the President of Indiana University, who in turn submitted his recommendations to the Board of Trustees.

Allegedly, each of these individuals or committees were to gather information from third parties and make a factual determination of whether or not these petitioners were entitled to tenure based upon the following rules of eligibility for tenure:

> TEACHING. The prime requisites of any effective teacher are intellectual competence, integrity, independence, a willingness to consider suggestions and to cooperate in teaching activities, a spirit of scholarly inquiry which leads him to develop and strengthen the content of his courses in the light of developments in his field as well as to improve his methods of presenting material, a vital interest in teaching and working with students, and, above all, the ability to stimulate their intellectual interest and enthusiasm***
>
> RESEARCH AND CREATIVE ACTIVITIES. In most of the fields represented in the program of the

University, publications in media of quality are expected as evidence of scholarly interest pursued independently of supervision or direction. An original contribution of a creative nature is as significant or as deserving as the publication of a scholarly book or article. Quality of production is considered more important than mere quantity. Significant evidence of scholarly merit may be either a single work of considerable importance or a series of studies constituting a general program of worthwhile research. The candidate should possess a definite continuing program of studies, investigations or creative works.

OTHER SERVICES. Educated talent, technical competence, and professional skills are indispensable in coping with the complexities of modern civilization. Because most technical assistance is carried on by professional men, and a high proportion of them have university connection, the University must provide men to fill this need. The performance of services for the University or for external organizations may retard accumulation of evidence for proficiency in research or teaching even while contributing to the value of the individual as a member of the University community. In such cases effective service should be given the same consideration in determining promotion as proficiency in teaching or research. The evaluation of the service should be in terms of the effectiveness with which the service is performed, its relation to the general welfare of the University, and its effect on the development of the individual.

On the 22nd day of May, 1970, petitioners herein were notified that they did not receive tenure. Immediately thereafter, they made a demand on the administration for a statement of reasons why they did not receive tenure. The administration answered by stating that it was and is a university rule that the reasons for any tenure decision shall remain confidential. Nevertheless, petitioners,

without a statement of reasons, went before a faculty committee requesting a review of the tenure decision. Using all the aforementioned rules of eligibility for tenure, the petitioners proved their eligibility and the committee recommended that both be granted tenure. The administration rejected their recommendations.

With no other recourse available to discover the reasons for the adverse tenure decision or to determine whether or not they were eligible for tenure pursuant to the rules, the petitioners filed a 1983 cause of action on the 27th day of April, 1971 in the United States District Court, in the Northern District of Indiana, South Bend Division, alleging deprivation by the administration of their constitutional rights secured by the First, Fifth, and Fourteenth Amendments to the Constitution of the United States; more particularly, that the administration had deprived them of minimum procedural due process encompassed within the Fourteenth Amendment, by failing to give them a statement of reasons or a hearing thereon before the administration's tenure decision became final.

On or about the 1st day of July, 1971, the teachers left the employment of the university because of the rule or regulation that the teachers had to receive tenure by their sixth year or be terminated at the end of their seventh year. The petitioners requested a preliminary injunction against such dismissal, but the same was denied. Thereafter, the teachers filed a motion for partial summary judgment requesting a statement of reasons and a hearing, and a stay of any further proceedings on the merits. On the 18th day of November, 1971, the District Court granted the motion, as reproduced in the Appendix to this petition.

The administration appealed and on the 6th day of April, 1973, the Seventh Circuit reversed the summary judgment and remanded the same for further proceedings as per form of order reproduced in the Appendix.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit Has Decided An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.

Whether or not the Fourteenth Amendment's procedural due process standards should be incorporated into procedures for determining tenure has never been decided herein. The Court has addressed itself to the summary dismissal of college professors from employment, but not to this question.

Slochower v. *Board of Education,* 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692, dealt with summary dismissal from employment of a tenured college professor; *Wieman* v. *Updegraff,* 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216, dealt with summary dismissal from employment of college professors during the term of their contracts; *Connell* v. *Higginbotham,* 403 U.S. 207, 91 S. Ct. 1772, 29 L. Ed. 2d 418, dealt with summary dismissal from employment of a non-tenured teacher because of her failure to sign a loyalty oath; *Roth* v. *Board of Regents of State Colleges,* 408 U.S. 564, 92 S. Ct. 2701 ..... L. Ed. 2d ....., dealt with the summary dismissal from employment of a college professor after his one (1) year contract of employment expired; and *Perry* v. *Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, ... L. Ed. 2d ....., also dealt with the summary dismissal of a de facto tenured college professor after his one (1) year contract of employment had expired.

None of the above dealt with due process requirements for tenure procedures, much less procedures where university administrations make tenure decisions by gathering information from third parties and from such information, making findings of fact as to the eligibility of each professor pursuant to the rules for eligibility for tenure. Further, in this case, six (6) individuals and two (2) secret committees submitted their findings of fact up an administrative chain of command to the Board of Trustees for final decision.

The due process sufficiency of this type of tenure procedure is a legal issue of considerable importance in the development of the law, not only because of the importance of receiving the benefit of tenure by college professors, but because the Seventh Circuit held that the aforementioned procedures were sufficient without a statement of reasons or a hearing being incorporated therein.

The probability of disputed or questionable facts entering into the tenure decision is great by the very nature of this procedure. It is important for these petitioners, who already invested six (6) years of teaching at this university, that they should at least have a reasonable opportunity to determine whether disputed or questionable facts entered into the decision or whether all the individuals or committees followed the rules for eligibility for tenure. However, because of this administration's policy to keep the decision secret, they have no opportunity to find out other than through time-consuming and expensive litigation. In order to prevent this injustice, at least a statement of reasons should be required by this Court.

II. The Seventh Circuit Has Decided A Federal Question In A Way In Conflict With The Applicable Decisions Of This Court.

This Court held in both *Roth, supra, and Sindermann, supra,* that a person would be entitled to procedural due process if such person had a legitimate claim of entitlement to a benefit and was summarily deprived of such benefit.

The petitioners herein were summarily deprived of the benefit of tenure when they received notice without a statement of reasons or a hearing thereon that they would not be granted the same. If they had been granted tenure, they would have received the benefit of measurable job security because they could not be terminated without cause.

Further, the petitioners herein do have a legitimate claim of entitlement to such benefit because of the rules for eligibility for tenure, which are set forth in the Appendix (App. 19). This Court in *Perry* v. *Sindermann, supra,* at 408 U.S. 601, citing *Roth,* said "A person's interest in a benefit is a 'property interest' for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." Further, this Court said in *Roth, supra,* at 408 U.S. 577, "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and support claims of entitlement to these benefits. Thus the welfare recipients in *Goldberg* v. *Kelly, supra,* had a claim of entitlement to welfare payments that was grounded in the statute

defining eligibility for them. The recipients had not yet shown that they were in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so."

Even though the Seventh Circuit disagreed, it is the petitioners' position herein that the aforementioned Supreme Court cases provide that absent any rules for eligibility for tenure, the petitioners would not be entitled to a statement of reasons or a hearing, but where there are rules defining eligibility for tenure, the petitioners would be given an opportunity to prove that they were eligible for tenure at a hearing prior to the final decision. Further, they would be given a statement of reasons to guide them at this hearing.

CONCLUSION

For the reasons set forth hereinabove, this petition for certiorari should be granted.

Respectfully submitted:

JOHN J. ROPER
Chapleau, Roper & McInerny & Farabaugh
316 First Bank Building
South Bend, Indiana 46601
Telephone: 219-233-5173

JOSEPH A. ROPER
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued Jan. 22, 1973)
April 6, 1973

(Received Apr 9 1973)

Before

Hon. LATHAM CASTLE, Senior Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

No. 72-1001
72-1002
WILLIAM FABRYCKI,
Plaintiff-Appellee,
vs.
THE TRUSTEES OF INDIANA UNIVERSITY, et al.,
Defendants-Appellants.

MATTHEW ZIVICH,
Plaintiff-Appellee,
vs.
THE TRUSTEES OF INDIANA UNIVERSITY, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.

ROBERT A. GRANT, *Judge*.

71 S 65
71 S 66

ORDER

This is an appeal from a judgment requiring defendant university trustees to give plaintiffs, who are non-tenured teachers, a statement of the reasons upon which defendants relied in deciding not to re-employ plaintiffs and

an opportunity for hearing thereon. The judgment was in conformity with and reliance upon our decision in *Roth* v. *Board of Regents of State Colleges,* 446 F2d 806 (7th Cir. 1971). Our decision, however, was later reversed in *Board of Regents* v. *Roth,* 408 U.S. 564 (1972) and the issues must be decided consistently with the latter.

Under regulations of Indiana University, "an individual appointed to the faculty shall have tenure after a probationary period of seven years unless he receives notice to the contrary." Each plaintiff was in his sixth year when notified that he would be appointed without tenure for the seventh year, and would not thereafter be appointed.

Plaintiffs offer certain distinctions between their situation and that of *Roth,* and argue that (1) they have a sufficient property interest in continued employment, or (2) denial of re-employment sufficiently imposed a stigma foreclosing freedom to take advantage of other employment opportunities so that the decision of the Supreme Court in *Roth* supports rather than defeats their claim.

Property

Plaintiffs would spell their property interest out of the existence of stated criteria for re-employment under tenure, and the proposition that the fulfillment of such criteria ripens into a property interest.

The Faculty Handbook provides: "After the appropriate probationary period, tenure shall be granted to those faculty members whose professional characteristics indicate that they will continue to serve with distinction in their appointed roles. The criteria for tenure and the criteria for promotions . . . are similar. Tenure will generally not be conferred unless the faculty member achieves, or gives strong promise of achieving, promotion in rank within the University. . . . The criteria for promotions include teaching, research or other creative work, and other services, administrative, professional, or academic in nature. A candidate for promotion should normally

excel in at least one of the above categories and be satisfactory in the others. Promotion to any rank is a recognition of past achievement and a sign of confidence that the individual is capable of greater responsibilities and accomplishments." Teaching, Research and Creative Activities, and Other Services are also described in general language.

Application of these criteria is clearly dependent upon exercise of wide discretion and individual value judgments. The concept of a probationary period underlines that proposition. We are unable to spell out the type of "entitlement" to which the Supreme Court referred, 408 U.S. at 577.

We do not find either in the criteria above quoted nor in other averments of the complaint a sufficient claim of unwritten common law tenure the possible existence of which the Supreme Court recognized in *Perry* v. *Sindermann*, 408 U.S. 593, 602.

Liberty

In *Roth*, the Supreme Court indicated there could be impairment of liberty if "the State, in declining to reemploy the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. 573.

Each plaintiff alleges that denial of tenure "has substantially and permanently impaired his employment opportunities in obtaining a similar teaching position elsewhere; it has personally degraded him and has significantly damaged his professional reputation in the eyes of his contemporaries, the academic community, and the community as a whole; and it has caused him great mental anguish and is a stigma which must be borne for the rest of his natural life."

These averments seem to make no more substantial claim than that the non-retention by Indiana will make plaintiffs less attractive to some other employers, already

found by the Supreme Court not to amount to a deprivation of liberty. 408 U.S. at 574, footnote 13.

In support of motions, plaintiffs offered affidavits of others that their reputations as artists and as persons have been damaged by the fact that the university decided not to retain them as teachers of art. We think this type of unfavorable inference has not been shown to be more significant than being "less attractive to some other employers."

Plaintiffs' claim of denial of due process was the only one dealt with by the district court, and the only one before us on this appeal.

The clerk of this court is directed to enter judgment reversing the judgment appealed from and remanding the cause for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

* * (Caption—Civil No. 71 S 65) * *

ORDER
(Filed Nov 15 1971)

It is the order of this Court that the following Memorandum, Findings of Fact, Conclusions of Law and Order be entered for the above captioned cause.

/s/ Robert A. Stevens
District Judge

Enter: 15 Nov 1971

MEMORANDUM

Plaintiffs in the above entitled action filed verified complaints 27 April 1971 alleging deprivation of First and Fourteenth Amendment rights arising from the employment-tenure practices of the defendant employers. Plaintiffs claim the tenure procedure, in and of itself, violates their right to due process on the basis that defendants need not tender a statement explaining the reasons for a non-reappointment and denial of tenure decision, nor is there provision for a hearing at which a prospective tenured employee may probe and rebut the reasons underpinning an adverse decision. Plaintiffs further charge that defendants terminated their employment arbitrarily and without factual foundation in violation of their rights to free expression. Plaintiffs seek by their action injunctive and declaratory relief together with damages.

Following a hearing on 19 August 1971, the Court denied plaintiffs' application for a preliminary injunction. On 4 October 1971 plaintiffs filed a motion for partial summary judgment and stay of proceedings to which

the defendants replied on 1 November 1971. Plaintiffs' motion asks for judgment on the issue of "procedural due process" (right to a statement and hearing) and requests the Court to suspend consideration of the "substantive due process" question (impingement of free speech) pending completion of a tenure hearing.

Plaintiffs throughout the instant proceedings have maintained that *Roth* v. *Board of Regents of State Colleges*, ... F2d ....., 40 Law Week 2060 (7th Cir. 1971) supports their contentions with respect to the procedural due process issue. Defendants have consistently maintained that *Roth* is distinguishable for the reasons that its facts develop out of a background of public disorder demanding a showing that a non-retention decision is predicated upon a violation of protected, personal, substantive rights. Further, defendants continue to argue that *Roth* requires proof of future employment disability as a consequence of a non-retention decision.

Subsequent to this Court's ruling on plaintiffs' motion for preliminary injunction, the Seventh Circuit Court of Appeals decided *Shirck* v. *Thomas*, ... F2d ..... (decided 2 September 1971), the majority holding that the district court erred in demanding a showing that non-retention be related to claimed abrogation of First Amendment rights. Judge Stevens enters his dissenting objection on considerations of federal abstention while conceding that recent expansion of Fourteenth Amendment rights would compel the majority's conclusion. The *Shrick* affirmation of the law in *Roth* coupled with the *Shirck* facts destroys one leg of the instant defendants' defense.

The future employment issue interjected by defendants is totally without substance on the question of their liability. The Seventh Circuit in *Roth* upheld Judge Doyle's view that arbitrary termination, ". . . creates concrete and practical difficulties for the professor in his subsequent academic career", a fair inference and conclusion which flow from proof of an unconstitutional

tenure procedure leading to loss of academic employment. *Roth* v. *Board of Regents of State Colleges*, 310 F.Supp. 972 (1970), at page 979. Accordingly, we find defendants' second contention meritless.

The fact that defendants accord their faculty members a "full blown due process type hearing" under circumstances different from those of the case at bar is irrelevant. The allegations of plaintiffs' faults as academicians presented by the defendants in opposition to the motion for summary judgment would be more appropriately the subject matter of a tenure hearing.

The defendants' claim that plaintiffs' motion for partial summary judgment is moot because of the prior denial of their application for preliminary injunction comes without any supporting authority. Defendants further fail to substantiate their contention that there are material fact issues attending the procedural due process question; as noted above, the plaintiffs' skills as teachers go to the substantive due process issue.

On the basis of the *Roth* and *Shirck* decisions, supra, we are compelled to find that plaintiffs herein were denied the minimum procedural safeguards to which they were, and continue to be, entitled. Following the teaching of *Roth* we now hold that plaintiffs are entitled to a statement of the reasons why the defendants intend not to retain them, notice of a hearing at which they may respond to the stated reasons, and a hearing if the plaintiffs appear at the appointed time and place. At the hearing plaintiffs must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the plaintiffs, and only if they make a reasonable showing that the stated reasons are wholly without reason or not supported by fact would the defendants become obliged to show that the stated reasons are not inappropriate.

We do not believe that reinstatement of the plaintiffs to their former positions is demanded at this time, and

therefore we deny that portion of relief requested in plaintiffs' motion for partial summary judgment. We do find that further Court proceedings should be stayed pending a university hearing.

Accordingly, we now enter the following Findings of Fact, Conclusions of Law, and Order, all of which is based upon uncontradicted facts presented by the parties' stipulation of facts filed 19 August 1971, their respective affidavits, and evidence adduced at the former hearing.

FINDINGS OF FACT

1. Plaintiff Matthew Zivich, age 34, is a resident of South Bend, Indiana, and was employed by the defendants September, 1964 at their South Bend campus as an art instructor. For each of seven years thereafter he received yearly employment contracts from the defendants and carried out his duties with defendants.

2. Plaintiff William Fabrycki, age 35, is a resident of South Bend, Indiana, was employed for a three year period by the defendants in 1967 at their South Bend campus as an assistant professor of art, and was credited with three years of prior teaching experience towards accumulation of tenure.

3. Indiana University is a state university organized and operated pursuant to Indiana State law, and its trustees, officers, agents, and employees, including the defendants are and were public employees whose conduct with reference to the subject matter of the plaintiffs' complaint was governed by state law and executed under color of state authority.

4. At all times here material the defendants had in effect a policy requiring that a teacher must be either re-appointed with tenure in his sixth year of employment or not be re-appointed following his seventh year.

5. Pursuant to the defendants' tenure policy each plaintiff received a notice in May and June 1970, from

defendants notifying each that he would not be re-appointed for the 1971-1972 school year.

6. Pursuant to defendants' practice neither plaintiff was given a statement of reasons for his non-retention, and neither waived any right to a statement.

7. Pursuant to defendants' policy and practice, neither plaintiff was issued notice of, nor was there convened, a hearing at which plaintiffs could respond to the reasons supporting defendants' decision to not re-appoint them, and neither waived any right to such a hearing and notice.

8. Plaintiffs' contracts have expired with the defendants, and neither has performed teaching duties with defendant since the beginning of the 1971-1972 school year as a result of the above described policies and practices.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this action.

2. The defendants' policies and actions with respect to the procedure applied to plaintiffs' employment terminations violate the Fourteenth Amendment for the reasons that defendants have denied and continue to deny the plaintiffs a statement of reasons why their employment was terminated, and refused and continue to refuse them a fair hearing, upon notice.

3. Further proceedings directed towards substantive due process issues and damages should be stayed pending satisfaction of the following Order.

ORDER

It Is The Order Of This Court that the following actions shall be executed:

1. Defendants are to deliver to plaintiffs' counsel a written statement of the reasons upon which the defendants relied in deciding not to offer plaintiffs a contract for the 1971-1972 school year on or before 22 November 1971.

2. Plaintiffs' attorneys are to inform defendants' attorneys in writing of all dates after 6 December 1971, and prior to 17 December 1971, upon which plaintiffs would be able to appear for a hearing in South Bend, Indiana.

3. Defendants are to deliver to plaintiffs' counsel a notice of a hearing at an appropriate place in South Bend, Indiana on a date which is among those designated by the plaintiffs and which is not less than five days subsequent to the date on which notice is delivered to plaintiffs' counsel; said notice is to advise the plaintiffs that at the specified place and time, they will be given an opportunity to respond to the reasons stated for their non-retention.

4. If plaintiffs appear at said hearing, defendants shall allow them an opportunity to respond to the reasons stated for their non-retention.

5. On or before 24 December 1971, defendants will notify plaintiffs' counsel that one or the other, or both of the plaintiffs herein will or will not be offered contracts as faculty members for the remainder of the 1971-1972 school year on terms and conditions no less favorable than those of the plaintiffs' last preceding employment with the defendants.

It Is Further Ordered That should defendants choose not to comply with the immediately preceding order, then the defendants shall be required, on or before 10 January 1972, to offer plaintiffs a contract as members of the faculty of the university on terms and conditions no less favorable than those of the plaintiffs' last preceding employment with the defendants.

It Is Further Ordered That further Court proceedings shall be stayed pending satisfaction of the above set forth orders.

/s/ Robert A. Stevens
District Judge

Enter: 15 Nov 1971

APPENDIX C

Pursuant to F.R.A.P. 28(f), page 17 of the All-University Faculty Handbook and pages 34-36 containing the rules and regulations for tenure are set forth herein:

CRITERIA FOR TENURE

After the appropriate probationary period, tenure shall be granted to those faculty members whose professional characteristics indicate that they will continue to serve with distinction in their appointed roles. The criteria for tenure and the criteria for promotions (see pp. 34-37 of the Faculty Handbook) are similar. Tenure will generally not be conferred unless the faculty member achieves, or gives strong promise of achieving, promotion in rank within the University.

CRITERIA FOR PROMOTIONS

The criteria for promotions include teaching, research or other creative work, and other services, administrative, professional, or academic in nature. A candidate for promotion should normally excel in at least one of the above categories and be satisfactory in the others. Promotion to any rank is a recognition of past achievement and a sign of confidence that the individual is capable of greater responsibilities and accomplishments.

TEACHING

The prime requisites of any effective teacher are intellectual competence, integrity, independence, a willingness to consider suggestions and to cooperate in teaching activities, a spirit of scholarly inquiry which leads him to develop and strengthen the content of his courses in the light of developments in his field as well as to improve his methods of presenting material, a vital interest in teaching and working with students, and, above all, the ability to stimulate their intellectual interest and enthusiasm. The quality of teaching is admittedly difficult to

evaluate. This evaluation is so important, however, that recommendations for an individual's promotion should include evidence drawn from such sources as the collective judgment of students, of student counselors, and of colleagues who have visited his classes or who have been closely associated with his teaching as a supervisor or in some other capacity or who have taught the same students in subsequent courses.

RESEARCH AND CREATIVE ACTIVITIES

In most of the fields represented in the program of the University, publications in media of quality are expected as evidence of scholarly interest pursued independently of supervision or direction. An original contribution of a creative nature is as significant or as deserving as the publication of a scholarly book or article. Quality of production is considered more important than mere quantity. Significant evidence of scholarly merit may be either a single work of considerable importance or a series of studies constituting a general program of worthwhile research. The candidate should possess a definite continuing program of studies, investigations or creative works.

OTHER SERVICES

Educated talent, technical competence, and professional skills aer indispensable in coping with the complexities of modern civilzation. Because most technical assistance is carried on by professional men, and a high proportion of them have university connection, the University must provide men to fill this need. The performance of services for the University or for external organizations may retard accumulation of evidence for proficiency in research or teaching even while contributing to the value of the individual as a member of the University community. In such cases effective service should be given the same consideration in determining promotion as proficiency in teaching or research. The evaluation of the service should be in terms of the effectiveness with which the service is performed, its relation to the general welfare of the University, and its effect on the development of the individual.

FILE COPY

FILED
JUL 25 1973
MICHAEL RODAK, JR., CLERK

No. 73-41

In the

Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM FABRYCKI,
MATTHEW ZIVICH,

Petitioners,

vs.

THE TRUSTEES OF INDIANA UNIVERSITY in their official capacity as body politic of Indiana University; JOHN W. RYAN, individually and in his capacity as President of Indiana University and former Vice President of Regional Campuses; JOSEPH LEE SUTTON, individually and in his capacity as former President of Indiana University; DEAN RUFUS REIBERG, individually and in his capacity as Acting Vice President of Regional Campus; DR. LESTER WOLFSON, individually and in his capacity as Chancellor, Indiana University at South Bend; DR. WALT RISLER, individually and in his capacity as Academic Dean, Indiana University at South Bend; PROF. DONALD SNYDER, individually and in his capacity as Director, Division of Arts and Sciences, Indiana University at South Bend; PROF. HAROLD ZISLA, individually and in his capacity as Chairman of the Art Department, Indiana University at South Bend; PROF. LARRY CLIPPER, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. CHARLES TULL, individually and in his capacity as a member of the Faculty Promotion and Tenure Commmittee; PROF. GLORIA SHAPIRO, individually and in her capacity as a member of the Faculty Promotion and Tenure Committee; PROF. WAYNE KREPLE, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. GEORGE WING, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; and THE REGIONAL CAMPUSES FACULTY PROMOTION AND TENURE BOARD,

Respondents.

BRIEF OPPOSING WRIT OF CERTIORARI

ROLAND OBENCHAIN
JONES, OBENCHAIN, JOHNSON, FORD, PANKOW & LINK
1800 American National Bank Building
South Bend, Indiana 46601
Telephone: (219) 233-1195

ROLAND OBENCHAIN and CLIFF K. TRAVIS
Attorneys for Respondents

© The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

	PAGE
Question Presented for Review	1
Statement of the Case	2
Argument	4
Conclusion	5

Table of Authorities

Board of Regents v. Roth, 408 U.S. 564; 92 S. Ct. 2701	4
Goldberg v. Kelly, 397 U.S. 254; 90 S. Ct. 1011	5
Perry v. Sindermann, 408 U.S. 593; 92 S. Ct. 2694	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-41

WILLIAM FABRYCKI,
MATTHEW ZIVICH,

Petitioners,

vs.

THE TRUSTEES OF INDIANA UNIVERSITY in their official capacity as body politic of Indiana University; JOHN W. RYAN, individually and in his capacity as President of Indiana University and former Vice President of Regional Campuses; JOSEPH LEE SUTTON, individually and in his capacity as former President of Indiana University; DEAN RUFUS REIBERG, individually and in his capacity as Acting Vice President of Regional Campus; DR. LESTER WOLFSON, individually and in his capacity as Chancellor, Indiana University at South Bend; DR. WALT RISLER, individually and in his capacity as Academic Dean, Indiana University at South Bend; PROF. DONALD SNYDER, individually and in his capacity as Director, Division of Arts and Sciences, Indiana University at South Bend; PROF. HAROLD ZISLA, individually and in his capacity as Chairman of the Art Department, Indiana University at South Bend; PROF. LARRY CLIPPER, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. CHARLES TULL, individually and in his capacity as a member of the Faculty Promotion and Tenure Commmittee; PROF. GLORIA SHAPIRO, individually and in her capacity as a member of the Faculty Promotion and Tenure Committee; PROF. WAYNE KREPLE, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; PROF. GEORGE WING, individually and in his capacity as a member of the Faculty Promotion and Tenure Committee; and THE REGIONAL CAMPUSES FACULTY PROMOTION AND TENURE BOARD,

Respondents.

BRIEF OPPOSING WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

The precise question presented to the District Court and to the court below was this: Do non-tenured faculty mem-

bers have a constitutional right to a statement of the reasons and a hearing when they are not reappointed at the end of their probationary period?

STATEMENT OF THE CASE

What petitioners refer to as "state rules for eligibility for tenure" are actually criteria for re-employment with tenure. The University's Handbook provides:

> "The principle of faculty tenure imposes reciprocal responsibilities on University as a body politic and on the faculty member. The University has the responsibility of maintaining the principles of academic freedom. To discharge this responsibility, the University provides tenure in order that the faculty member may be secure to do his scholarly work. The faculty member, on his part, is obligated to maintain high standards of professional conduct, research, and teaching in the advancement of knowledge and its communication to others. * * *
> Subject to the provisions which follow, an individual appointed to the faculty shall have tenure after a probationary period of seven years unless he receives notice to the contrary. This period shall include full-time service with faculty rank at other institutions, provided similar service at Indiana University counts toward tenure in the administrative unit concerned. * * *
>
> Appointments and reappointments during a probationary period shall be limited to one year for instructors. * * *
>
> Written notice that a probationary appointment is not to be renewed shall be given according to the following rules. * * * Notice of termination after the second year of service at Indiana University shall be given not later than June 1 of the year preceding the year in which the appointment expires. * * *"
> Appendix 137, 138.

The Faculty Handbook further provides:

"After the appropriate probationary period, tenure shall be granted to those faculty members whose professional characteristics indicate that they will continue to serve with distinction in their appointed roles. The criteria for tenure and the criteria for promotion * * * are similar. Tenure will generally not be conferred unless the faculty member achieves, or gives strong promise of achieving, promotion in rank within the rank of the University. * * * The criteria for promotions include teaching, research or other creative work, and other services, administrative, professional, or academic in nature. A candidate for promotion should normally excel in at least one of the above categories and be satisfactory in the others. Promotion to any rank is a recognition of past achievement and a sign of confidence that the individual is capable of greater responsibilities and accomplishments. Opinion Seventh Circuit. Furthermore it is the general policy of institutions not to confer tenure upon a faculty member unless he is extraordinarily well qualified and also not to confer tenure when the result would be to create an overbalance of tenured faculty within a single department or within an institution. Many decisions not to grant tenure are affected by the size, composition, payroll flexibility and academic direction and thrust of the institution as well as by the characteristics of the faculty member who is eligible for tenure. Appendix 125."

ARGUMENT

Board of Regents v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701, controls these cases on the procedural due process issue.

It makes no difference whether the probationer is not reappointed in the last year of the probationary period or some one of the intermediate years. The effect is the same. Tenure is not attained. The probationer acquires no protected property right under the criteria set out on some sort of installment plan. He is no more entitled to reappointment in the last year of probation than he was in the first year. Roth was not reappointed after his first year. Petitioners were not reappointed after their seventh year. It is clear that this factual difference does not distinguish these cases from Roth and Petitioners have not so contended.

In Roth the tenure question was controlled by Wisconsin Statute. In these cases it is controlled by the Faculty Handbook. Neither conferred upon the probationer a legitimate claim of entitlement to tenure. It is even more true at Indiana University and other institutions where it is the policy not to confer tenure upon a faculty member unless he is extraordinarily well qualified and also not to confer tenure when the result would be to create an overbalance of tenured faculty within a single department or within an institution. Many decisions not to grant tenure are affected by the size, composition, payroll, flexibility, and academic direction and thrust of the institution as well as by the characteristics of the faculty member who was eligible for tenure. As the Court of Appeals said in its opinion:

"Application of these criteria is clearly dependent upon exercise of wide discretion and individual value judgments. The concept of probationary period underlines that proposition. We are unable to spell out the type of 'entitlement' to which the Supreme Court referred, 408 U.S. at 577."

Goldberg v. *Kelly*, 397 U.S. 254; 90 S. Ct. 1011, is distinguishable from *Roth* and these cases on the facts. In *Goldberg* welfare was terminated by the duly constituted authority. It was agreed that this could not be done without due process of law. The critical issue was whether due process required a pre-termination hearing as well as a post-termination hearing.

Perry v. *Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, also is distinguishable from *Roth* and these cases because in that case the faculty member had acquired *de facto* tenure and this was a property right which could not be taken from him without due process of law.

At Indiana University there is no absolute right to tenure on the part of any faculty member. Tenure does not come about automatically at the end of seven years. Much goes into a tenure decision, including the exercise of wide discretion and individual value judgments and other things beyond the control of any person or persons.

CONCLUSION

There is no new important legal question presented by the Petition. The principles announced by *Roth* clearly control the question presented by the facts of this case. Any factual distinctions between this case and *Roth* are

of minimal legal significance. The Petition should, therefore, be denied.

Respectfully submitted,

ROLAND OBENCHAIN and CLIFF K. TRAVIS
By: /s/ ROLAND OBENCHAIN
Roland Obenchain
1800 American National Bank Building
South Bend, Indiana 46601
Telephone: (219) 233-1195
Attorneys for Respondents